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88-467

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

JOHN FIORILLA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether, absent exceptional circumstances, a federal trial judge's continuation of a jury poll following dissent of a single juror, without first affording opportunity for further deliberations, with the result that the numerical division of the jury with respect to the verdict is disclosed, may be sanctioned by the United States Court of Appeals, Third Circuit, upon conviction of the defendant, as a valid exercise of the trial court's discretion, notwithstanding the requirements of Fed. R. Crim. P. 31(d) and the rule of the Supreme Court of the United States prohibiting a federal trial judge from inquiring into the numerical standing of a jury with respect to the verdict and mandating that such inquiry is reversible error per se.

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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2. Mary Fiorilla (United States Court of Appeals, Third Circuit, Docket No. 87-5446), defendant. Of Counsel: Jonathan L. Goldstein, Esq., Hellring, Lindeman, Goldstein, Siegal, Stern & Greenberg, 1180 Raymond Boulevard, Newark, New Jersey 07102, (201) 621-9020.

3. John Fiorilla (United States Court of Appeals, Third Circuit, Docket No. 87-5445), defendant. Of Counsel: Adolph J. Galluccio, Esq., Browne & Galluccio, Attorneys-at-Law, 9 Colt Street, Paterson, New Jersey 07505, (201) 278-0600.

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No.

In The

Supreme Court of the United States

October Term, 1988

JOHN FIORILLA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, John Fiorilla, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this cause on June 30, 1988. Rehearing in banc denied, July 26, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Third

Circuit, entered in this cause on June 30, 1988, is officially reported at 850 F.2d 172 (3 Cir. 1988). The full text of the opinion is reflected at Appendix C, *infra,* at 4a.

The order of the United States Court of Appeals, Third Circuit, entered in this cause on July 26, 1988, denying petitioner's application for rehearing in banc is reflected at Appendix B, *infra,* at 2a.

The order of the United States Court of Appeals, Third Circuit, entered in this cause on August 11, 1988, staying issuance of mandate until September 1, 1988, is reflected at Appendix A, *infra,* at 1a.

The judgment of the United States District Court, District of New Jersey, entered in this cause on July 8, 1987, and from which appeal to the United States Court of Appeals, Third Circuit, was taken, is reflected at Appendix D, *infra,* at 19a.

STATEMENT OF JURISDICTION

On June 30, 1988, the United States Court of Appeals, Third Circuit, filed judgment in petitioner's cause.

On July 26, 1988, the United States Court of Appeals, Third Circuit, denied petitioner's application for rehearing in banc.

On August 11, 1988, the United States Court of Appeals, Third Circuit, stayed issuance of mandate in petitioner's cause until September 1, 1988.

The jurisdiction of the Supreme Court of the United States to review the judgment of the United States Court of Appeals, Third Circuit, is invoked under 28 U.S.C.A. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This petition implicates only Federal Rule of Criminal Procedure 31(d), with text as follows:

> (d) Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

STATEMENT OF THE CASE

Petitioner, John Fiorilla, and co-defendant Mary Fiorilla (petitioner's spouse), (hereinafter, "the Fiorillas"), appealed to the United States Court of Appeals, Third Circuit, from judgments of sentence imposed by the United States District Court, District of New Jersey, in consequence of jury verdicts of guilty rendered against them for violation of 8 U.S.C.A. § 1324, 18 U.S.C.A. § 371, 18 U.S.C.A. § 1001, and 18 U.S.C.A. § 2.*

Jurisdiction over the appeal was vested in the United States Court of Appeals, Third Circuit, by 28 U.S.C.A. § 1291 (appeal from a final order of the United States District Court).

---

* 8 U.S.C.A. § 1324 makes unlawful bringing aliens not duly admitted by an immigration officer or not lawfully entitled to enter the United States into the United States and harboring them. 18 U.S.C.A. § 371 makes unlawful a conspiracy to commit any offense against the United States. 18 U.S.C.A. § 1001 prohibits the making of false statements or representations to any department or agency of the United States. 18 U.S.C.A. § 2 defines the category of persons punishable as principal criminal actors under the United States Code.

The Fiorillas had been indicted along with three co-defendants on one count of conspiracy to harbor illegal aliens, 18 U.S.C.A. § 371, and nine substantive counts of harboring illegal aliens, 8 U.S.C.A. § 1324 and 18 U.S.C.A. § 2. The Fiorillas were also charged with two counts of false statements to the United States Labor Department and the Immigration and Naturalization Service in violation of 18 U.S.C.A. §§ 2 and 1001. After the trial, the jury informed the court that it had reached a verdict, returned to the courtroom and delivered its decision. John and Mary Fiorilla were found guilty on all counts with which they had been charged under the jury foreman's original announcement of the collective verdict. Thomas Fiorilla, Frances Scullion and Charles Hirschkind were also on trial with the Fiorillas for charges stemming from the employment of aliens at the Fiorillas' nursing homes. Thomas Fiorilla was found not guilty on counts one through four and guilty on counts five through thirteen. Frances Scullion was found guilty on count one and counts five through thirteen and not guilty on counts two through four. Charles Hirschkind was found not guilty on all counts. Counsel for John Fiorilla then asked to poll the jury.

The individual jurors were first asked whether they concurred in the verdict as it related to John Fiorilla. Jurors one through nine agreed with the reported verdict. With juror number ten, this colloquy ensued:

> THE COURT: Mr. Fonseca, do you agree or disagree with the verdict against John Fiorilla as I have just reported it?.
>
> JUROR NO. 10: I disagree.
>
> THE COURT: You disagree with the verdict as reported?

JUROR NO. 10: Yes.

THE COURT: Did I report it inaccurately?

JUROR NO. 10: Yes.

THE COURT: Let me reiterate what was stated here. As I told you, your verdict in this case had to be 12 nothing. Correct?

* * *

In other words, the report of the jury here on this verdict sheet was that the jury had found Mr. John Fiorilla unanimously guilty on all counts with which he was charged. Now, what I am asking you is do you agree or disagree with that verdict as reported here?

Do you understand what I am saying?

JUROR NO. 10: Yes, I understand. Yes, to be honest, I have no peace in me.

(Joint Appendix below, hereinafter "JA", at 1758-1759; Appendix C, *infra*, at 7a). The trial court excused the other eleven jurors and then renewed his discussion with Mr. Fonseca.

THE COURT: Mr. Fonseca, I'd like to hear what you have to say or what you meant by that comment and we will take it from there. When you said you have no peace in you, could you amplify that for us please?

JUROR NO. 10: Sure. When we were up there

> in the jury room discussing [*sic.*] the defendants were guilty or not guilty, I gave my opinion and everybody gave their opinion and when I gave mine all of them started giving me their point of view and I kind of saw myself, you know, attacked, you know, and so I agreed. But —.

(JA1759-1760; Appendix C, *infra,* at 8a).

At that point, the trial judge reread to Mr. Fonseca that portion of the charge to the jury referring to a juror's obligation to deliberate with a view to reaching an agreement, consistent with language approved by the United States Court of Appeals, Third Circuit, in *United States v. Fioravanti,* 412 F.2d 407 (3 Cir. 1969), *cert. denied,* 396 U.S. 837, 90 S. Ct. 97, 24 L. Ed. 2d 88 (1969). Once again, Juror Fonseca reiterated his position that the verdict sheet did not reflect his view on the guilt or innocence of John Fiorilla. All counsel then agreed with the trial court's suggestion that Mr. Fonseca be questioned on his position about the other defendants. So questioned, this juror expressed his disagreement with all of the jury's findings of guilt against Mary Fiorilla. He then voiced agreement with the findings exonerating Thomas Fiorilla and Frances Scullion but disagreed with all of the guilty findings against these last two defendants. On defendant Charles Hirschkind, Juror Fonseca agreed with the determination of innocence on all counts. Since no discrepancy appeared as to Mr. Hirschkind, a verdict of acquittal was recorded as to him.

The trial judge then revealed his intention to continue the poll as to the remaining jurors. Jurors eleven and twelve indicated their agreement with the reported verdicts as to John Fiorilla. The eleven jurors then stated their approval of Mary Fiorilla's guilty verdicts. Similarly, the eleven voiced their assent in the guilty findings as to Thomas Fiorilla and Frances Scullion. Through

the polling of the jurors in this manner, an eleven to one division on the guilty verdicts became apparent.

The trial court temporarily excused the jury, but ordered them to return for further deliberations the following morning. The following morning, the trial court ordered the jury to continue its deliberations. After two days of additional deliberations, the jury returned a verdict finding John and Mary Fiorilla guilty on all counts but completely exonerating Thomas Fiorilla and Frances Scullion. A second poll of the jury showed no discrepancy between the reported collective verdicts and the jurors' individual votes.

The Fiorillas interposed timely motions for mistrial in their respective causes because the trial judge had continued the jury poll after Juror No. 10 voiced disagreement with the initially reported collective verdict. After briefing and oral argument, the district court ruled that the jury poll did not warrant the granting of a new trial under the unique circumstances of the case. On appeal, the Fiorillas renewed their argument that the continued polling of the jury, following the dissent of one of its members, with the result that the numerical division of the jury with respect to the verdict was disclosed, requires the granting of a new trial. The United States Court of Appeals, Third Circuit, ruled that continuation of the jury poll following the dissent of one of its members, notwithstanding the resultant disclosure of the numerical division of the jury as to the verdict, was a valid exercise of the trial court's discretion and denied the appeal.

REASONS FOR GRANTING THE WRIT

I.

IN APPROVING THE CONTINUATION OF THE JURY POLL BY THE TRIAL COURT FOLLOWING THE DISSENT OF A SINGLE JUROR TO THE INITIALLY REPORTED COLLECTIVE VERDICT, WITHOUT FIRST AFFORDING THE OPPORTUNITY FOR FURTHER DELIBERATIONS, WITH THE RESULT THAT THE NUMERICAL DIVISION OF THE JURY AS TO THE VERDICT WAS DISCLOSED, AS A VALID EXERCISE OF THE TRIAL COURT'S DISCRETION, THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS, THIRD CIRCUIT, HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS SANCTIONED BY THE JURISPRUDENCE OF THE SUPREME COURT OF THE UNITED STATES, AND, FURTHER, HAS SO FAR SANCTIONED SUCH DEPARTURE BY THE UNITED STATES DISTRICT COURT, AS TO WARRANT AN EXERCISE BY THE UNITED STATES SUPREME COURT OF ITS POWER OF SUPERVISION.

In *Burton v. United States,* 196 U.S. 283, 25 S. Ct. 243, 49 L. Ed. 482 (1905), where a conviction was reversed on other grounds, the United States Supreme Court condemned the practice of inquiring of a jury, unable to agree, the extent of its numerical division, although a response indicating the vote in favor of or against conviction was neither sought nor obtained. The Supreme Court then said (196 U.S. at 308, 25 S. Ct. at 350, 49 L. Ed. at 491):

> . . . We do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge.

The numerical division polling issue was ultimately definitively resolved by the United States Supreme Court in *Brasfield et al. v. United States,* 272 U.S. 448, 47 S. Ct. 135, 71 L. Ed. 345 (1926), in language and with observations as follows:

> There is a diversity of view in the Circuit Courts of Appeals whether noncompliance with the rule as stated in the *Burton* case is reversible error, or whether the expressions in that opinion are hortatory only. [Citations omitted.]
>
> *We deem it essential to the fair and impartial conduct of the trial that the inquiry itself should be regarded as ground for reversal.* Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but, in general, its tendency is coercive. (Emphasis supplied.)
>
> It can rarely be resorted to without bringing to bear in some degree, serious, although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge should be excluded. *Such a practice, which is never useful and is generally harmful, is not to be sanctioned.* (Emphasis supplied.)
>
> *The failure of petitioners' counsel to particularize an exception to the court's inquiry does not preclude this Court from correcting the error.*

> (Citations omitted.) This is especially the case where the error, as here, affects the proper relations of the court to the jury, and cannot be effectvely remedied by modification of the judge's charge after the harm has been done. (Emphasis supplied.)

Brasfield et al. v. United States, supra, 272 U.S. at 449-450, 47 S. Ct. at 135-136, 71 L. Ed. at 346.

The United States Supreme Court recently indicated the continuing vitality of the jurisprudential philosophy expressed in *Brasfield. Cf., Lowenfield v. Phelps,* ____ U.S. ____, 108 S. Ct. 546, 552, ____ L. Ed. 2d ____, ____ (1988).

In approving the continuation of the jury poll by the trial court following the dissent of a single juror to the initially reported collective verdict, without first affording the opportunity for further deliberations, with the result that the numerical division of the jury as to the verdict was disclosed, as a valid exercise of the trial court's discretion, the judgment of the United States Court of Appeals, Third Circuit, has so far departed from the accepted and usual course of judicial proceedings as sanctioned by the jurisprudence of the Supreme Court of the United States, and, further, has so far sanctioned such departure by the United States District Court, as to warrant an exercise by the United States Supreme Court of its power of supervision.

II.

IN APPROVING THE CONTINUATION OF THE JURY POLL BY THE TRIAL COURT FOLLOWING THE DISSENT OF A SINGLE JUROR TO THE INITIALLY REPORTED COLLECTIVE VERDICT, WITHOUT FIRST AFFORDING THE OPPORTUNITY FOR FURTHER DELIBERATIONS, WITH THE RESULT THAT THE NUMERICAL DIVISION OF THE JURY AS TO THE VERDICT WAS DISCLOSED, AS A VALID EXERCISE OF THE TRIAL COURT'S DISCRETION, THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS, THIRD CIRCUIT, IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS ON THE SAME MATTER, AND, IN FACT, ITS OWN FORMER JURISPRUDENCE GOVERNING THE ISSUE. THE CONFLICT WARRANTS AN EXERCISE BY THE UNITED STATES SUPREME COURT OF ITS POWER OF SUPERVISION.

In *United States v. Spitz,* 696 F.2d 916 (11 Cir. 1983), the United States Court of Appeals for the Eleventh Circuit faced a jury polling issue strikingly similar to the case of petitioner herein. Defendant appealed his conviction of conspiracy to import marijuana into the United States in violation of 18 U.S.C.A. § 963. He did not challenge the sufficiency of the evidence to support his conviction, but claimed error in the continuation of the poll of the jury after its lack of unanimity was revealed. The Eleventh Circuit agreed and reversed invoking the *Brasfield* rule, *supra.*

Factually, the *Spitz* jury informed the court that it had reached a verdict, returned to the courtroom, and a guilty verdict was returned. At the defendant's request the jurors were polled in the numerical order of their seating. The first seven jurors assented to the verdict. Juror No. 8 did not. The trial court continued

the poll and the remaining four jurors assented to the verdict. The Eleventh Circuit detailed Fed. R. Crim. P. 31(d), then addressed the polling issue in the following language:

> The purpose of the rule is to insure that each member of the jury agrees with the verdict and to discover possible coercion. *United States v. Edwards,* 469 F.2d 1362 (5 Cir. 1972). But the effect of what the court did in this instance, by continuing the poll for no reason at all, was to establish how the jury stood numerically. To do so was *per se* error.

United States v. Spitz, supra, 696 F.2d at 917.

The Court of Appeals specifically invoked the *Brasfield* rule and further recounted federal appellate experience on the issue in *Sincox v. United States,* 571 F.2d 876 (5 Cir. 1978), in which a juror responded to a poll of the published verdict, "Yes. With a reasonable doubt." The trial court then polled the remaining jurors and accepted a verdict of guilty. The Court of Appeals reversed saying, "When Juror Lewis was polled and stated that he had a reasonable doubt, the trial judge had the duty either to order the jury to return for further deliberations or to dismiss them. Absent exceptional circumstances, not here applicable, there was no third option." *See United States v. Edwards, supra; United States v. Spitz, supra,* 696 F.2d at 918. The Eleventh Circuit noted that an "exceptional circumstance" may arise when there is an apparent confusion on the juror's part and that may be clarified by interrogation by the court, a situation which it did not find to exist in either *Spitz* or *Sincox. Id.* at n. 1. It is clear, in light of Mr. Fonseca's responses to the trial court, that "exceptional circumstances" do not exist in the case of petitioner herein.

The Eleventh Circuit concluded *Spitz* with the unequivocal instruction: "The poll should have been stopped as soon as the

lack of unanimity was revealed. *United States v. Warren,* 594 F.2d 1046 (5 Cir. 1979). Failure to do so was error. Reversed." *United States v. Spitz, supra,* 696 F.2d at 918.

The Third Circuit formerly joined the Eleventh Circuit in its strict application of the *Brasfield* rule. *Cf., United States v. Aimone, et al.,* 715 F.2d 822, 833 (3 Cir. 1983), *cert. denied,* 468 U.S. 1217, 104 S. Ct. 3585, 82 L. Ed. 2d 883 (1984); *Gov't of Virgin Islands v. Romain,* 600 F.2d 435, 436 (3 Cir. 1979), specifically adopting the "plain error" reversal rule expressed in *Brasfield. Cf., Gov't of Virgin Islands v. Romain, supra,* 600 F.2d at 437.

In *Aimone,* a juror (Juror No. 4) expressed disagreement with the verdict as announced. The trial court immediately, and correctly, returned the jury to deliberate. On appeal, the defendant argued that the trial court had committed error in that, *inter alia,* after Juror No. 4 had dissented, it did not continue the jury poll. The United States Court of Appeals, Third Circuit, upheld the District Court's decision to return the jury to deliberate rather than continuing the poll, questioning Juror No. 4, or declaring a mistrial. The Third Ciruit held:

> Moreover, we have held it to be error for a trial judge to inquire into the numerical division of the jury when informed that a jury has been unable to reach a decision. *Gov't of Virgin Islands v. Romain,* 600 F.2d 435 (3 Cir. 1979); see *Brasfield v. United States,* 272 U.S. 448, 47 S. Ct. 135, 71 L. Ed. 345 (1926). Had the trial judge continued the, first poll after Juror No. 4 dissented, the numerical division of the jury would have been revealed. Once a juror has dissented from the verdict, there is no need for further polling and to continue the process without the opportunity for further deliberation is erroneous. See *United*

States v. Spitz, 696 F.2d 916 (11 Cir. 1983) (*per se* error to continue polling).

United States v. Aimone, supra, 715 F.2d at 833.

In *Romain*, the Third Circuit, in a decision bottomed on the *Brasfield* rule, held it was reversible error for a trial judge, on being notified by the jury foreman that the jury was unable to arrive at a decision, to inquire of the foreman as to how the jury was divided and requesting that numbers be inserted in two spaces provided at the bottom of the court's note, the note being returned to the trial judge with spaces filled in indicating a division of ten to two. The Third Circuit further held that the error in the trial judge's ascertaining how jurors were divided over the issue of conviction or acquittal was error which could not be cured, and thus failure to bring such error to the trial court's attention did not preclude its correction on appeal. *Gov't of Virgin Islands v. Romain, supra,* 600 F.2d at 437; *Brasfield v. United States, supra,* 272 U.S. at 449-450, 47 S. Ct. at 135-136, 71 L. Ed. at 346.

The *Brasfield* rule, in and of itself, is categorically endorsed in the Eighth and Ninth Circuits. *Cf., Cornell v. Iowa,* 628 F.2d 1044 (8 Cir. 1980), *cert. denied,* 449 U.S. 1126, 101 S. Ct. 944, 67 L. Ed. 2d 112 (1981). *Cf., also, United States v. Sae-Chua,* 725 F.2d 530 (9 Cir. 1984).

In approving the continuation of the jury poll by the trial court following the dissent of a single juror to the initially reported collective verdict, without first affording the opportunity for further deliberations, with the result that the numerical division of the jury as to the verdict was disclosed, as a valid exercise of the trial court's discretion, the judgment of the United States Court of Appeals, Third Circuit, is in direct conflict with the decisions of other federal courts of appeals on the same matter, and, in fact, its own former jurisprudence governing the issue.

The conflict warrants an exercise by the United States Supreme Court of its power of supervision.

CONCLUSION

For the reasons expressed herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals, Third Circuit.

Respectfully submitted,

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Attorney for Petitioner

ADOLPH J. GALLUCCIO, ESQ.;
HARVEY R. BROWNE, ESQ.
Of Counsel and
On the Petition

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS, THIRD CIRCUIT, STAYING ISSUANCE OF MANDATE IN APPELLANT'S CAUSE UNTIL SEPTEMBER 1, 1988, DATED AUGUST 11, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5445

UNITED STATES OF AMERICA,

vs.

JOHN FIORILLA,

Appellant.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until September 1, 1988.

s/William D. Hutchinson
Circuit Judge

Dated: August 11, 1988

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS, THIRD CIRCUIT, DENYING APPELLANT'S PETITION FOR REHEARING IN BANC, DATED JULY 26, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5445

UNITED STATES OF AMERICA,

Appellee,

vs.

JOHN FIORILLA,

Appellant.

(D.C. Criminal No. 86-00291-01)

SUR PETITION FOR REHEARING

PRESENT: SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN AND ROSENN, *Circuit Judges*

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available court judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active

Appendix B

service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/William D. Hutchinson
Circuit Judges

DATED: July 26, 1988

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS, THIRD CIRCUIT, DATED JUNE 30, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 87-5445 & 87-5446

UNITED STATES OF AMERICA,
Appellee

v.

JOHN FIORILLA,
Appellant at No. 87-5445

UNITED STATES OF AMERICA,
Appellee

v.

MARY FIORILLA,
Appellant at No. 87-5446

Appeal from the United States
District Court for the
District of New Jersey
(D.C. Criminal Nos. 86-00291-01
and 86-00291-02)

Argued: April 14, 1988

BEFORE: HUTCHINSON, SCIRICA and
ROSENN, *Circuit Judges*

(Opinion Filed June 30, 1988)

Appendix C

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OPINION OF THE COURT

HUTCHINSON, *Circuit Judge*

Defendant-appellants John and Mary Fiorilla (the Fiorillas) appeal from judgments of sentence imposed after a jury found them guilty of violating 8 U.S.C.A. § 1324 (West Supp. 1988), 18 U.S.C.A. § 371 (West 1966) and 18 U.S.C.A. § 1001 (West 1976).[1] We have

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1. 8 U.S.C.A. § 1324 makes unlawful bringing aliens not duly admitted by an immigration officer or not lawfully entitled to enter the United States into the United States and harboring them. 18 U.S.C.A. § 371 makes unlawful a conspiracy to commit any offense against the United States. 18 U.S.C.A. § 1001 prohibits the making of false statements or representations to any department or agency of the United States.

jurisdiction over this appeal from a final order of the district court. 28 U.S.C.A. § 1291 (West Supp. 1988). Appellants contend that the district court erred in failing to grant their request for a new trial when a poll taken following the announcement of the purportedly unanimous verdict revealed a dissident within the jury. The trial judge ordered the jurors to continue their deliberations. They did and returned unanimous verdicts. Because the trial judge properly determined that the inadvertent disclosure of the venire's division did not coerce the recalcitrant juror, we believe he had discretion to order the verdict recorded. On this record that discretion was not abused. We will therefore affirm the judgments of sentence.[2]

The Fiorillas had been indicted along with three co-defendants on one count of conspiracy to harbor illegal aliens, 18 U.S.C.A. § 371, and nine substantive counts of harboring illegal aliens, 18 U.S.C.A. § § 2 and 3124. The Fiorillas were also charged with two counts of false statements to the United States Labor Department and the Immigration and Naturalization Service in violation of 18 U.S.C.A. § § 2 and 1001. After the trial, the jury informed the court that it had reached a verdict, returned to the courtroom and delivered its decision. John and Mary Fiorilla were found guilty on all counts with which they had been charged under the jury foreman's original announcement of the collective verdict. Thomas Fiorilla, Frances Scullion and Charles Hirschkind were also on trial with appellants John and Mary Fiorilla for charges stemming from the employment of aliens at appellants' nursing homes. Thomas Fiorilla was found not guilty on counts one through four and guilty on

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2. Appellants raise eight additional contentions, listed in the appendix, which we have fully considered and will reject without discussion in the opinion.

counts five through thirteen. Frances Scullion was found guilty on count one and counts five through thirteen and not guilty on counts two through four. Charles Hirschkind was found not guilty on all counts. Counsel for John Fiorilla then asked to poll the jury.

The individual jurors were first asked whether they concurred in the verdict as it related to John Fiorilla. Jurors one through nine agreed with the reported verdict. With juror number ten, this colloquy ensued:

> THE COURT: Mr. Fonseca, do you agree or disagree with the verdict against John Fiorilla as I have just reported it?
>
> JUROR NO. 10: I disagree.
>
> THE COURT: You disagree with the verdict as reported?
>
> JUROR NO. 10: Yes.
>
> THE COURT: Did I report it inaccurately?
>
> JUROR NO. 10: Yes.
>
> THE COURT: Let me reiterate what was stated here. As I told you, your verdict in this case had to be 12 nothing. Correct?
>
> . . . .
>
> In other words, the report of the jury here on this verdict sheet was that the jury had found Mr. John Fiorilla unanimously guilty on all counts with which he was charged. Now, what I am asking you is do you agree or disagree with that verdict as reported here?
>
> Do you understand what I am saying?
>
> JUROR NO. 10: Yes, I understand. Yes, to be honest, I have no peace in me.

Jt. App. at 1758-59. The trial court excused the other eleven jurors and then renewed his discussion with Mr. Fonseca:

> THE COURT: Mr. Fonseca, I'd like to hear what you have to say or what you meant by that comment and we will take it from there. When you said you have no peace in you, could you amplify that for us, please?
>
> JUROR NO. 10: Sure. When we were up there in the jury room discussing [sic] the defendants were guilty or not guilty, I gave my opinion and everybody gave their opinion and when I gave mine all of them started giving me their point of view and I kind of saw myself, you know, attacked, you know, and so I agreed. But --

Id. at 1759-60. At that point, the trial judge reread to Mr. Fonseca that portion of the charge to the jury referring to a juror's obligation to deliberate with a view to reaching an agreement, consistent with language approved by this Court in *United States v. Fioravanti*, 412 F.2d 407 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969). Once again, juror Fonseca reiterated his position that the verdict sheet did not reflect his view on the guilt or innocence of John Fiorilla.

All counsel then agreed with the trial court's suggestion that Mr. Fonseca be questioned on his position about the other defendants. So questioned, this juror expressed his disagreement with all of the jury's findings of guilt against Mary Fiorilla. He then voiced agreement with the findings exonerating Thomas Fiorilla and Frances Scullion but disagreed with all of the guilty findings against these last two defendants. On defendant Charles Hirschkind, juror Fonseca agreed with the determination of innocence on all counts. Since no discrepancy appeared as to Mr.

Hirschkind, a verdict of acquittal was recorded as to him.

The trial judge then revealed his intention to continue the poll as to the remaining jurors. At this point, counsel advanced no objection to the trial court's proposal to interrogate the other members of the venire.[3] Jurors eleven and twelve indicated their agreement with the reported verdicts as to John Fiorilla. The eleven jurors then stated their approval of Mary Fiorilla's guilty verdicts. Similarly, the eleven voiced their assent in the guilty findings as to Thomas Fiorilla and Frances Scullion. Through the polling of the jurors in this manner, an eleven to one division on the guilty verdicts became apparent. The trial court temporarily excused the jury but ordered them to return for further deliberations the following morning.

The next morning, the trial judge informed counsel of an Eleventh Circuit decision, *United States v. Spitz*, 696 F.2d 916 (11th Cir. 1983) (per curiam), which held that a trial judge may not continue a poll once a dissenter has emerged. Although the trial judge was not yet prepared to grant a mistrial on this basis, he sought to give all counsel the benefit of his research. In the meantime, he ordered the jury to continue its

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3. Appellants point out that immediately following juror Fonseca's disclosure, the trial judge stated: "All objections are preserved." Jt. App. at 1760. This comment came at a point when the judge sought to converse with the lone juror without the distractions of counsel. Before the remaining jurors were brought back into the courtroom, the trial judge gave counsel ample opportunity to argue the problem and to raise any objections concerning the continued polling. It would be inappropriate to decide this case on waiver grounds. We note, however, counsel's failure to object contemporaneously and specifically to the polling of the other eleven jurors as evidence of an absence of a coercive atmosphere. *See infra* typescript at 12.

deliberations. After two days of additional deliberations, the jury returned a verdict finding John and Mary Fiorilla guilty on all counts but completely exonerating Thomas Fiorilla and Frances Scullion. A second poll of the jury showed no discrepancy between the reported collective verdicts and the jurors' individual votes.

In their post-trial motions the Fiorillas renewed their request for a mistrial because the trial judge continued the jury poll after juror number ten voiced disagreement with the initially reported collective verdict. After briefing and oral argument, the district court ruled that the jury poll did not warrant the granting of a new trial under the unique circumstances of this case. The appellants now renew their argument that the continued polling of the jury, following the dissent of one of its members, requires the granting of a new trial. In support, appellants cite the decision in *Brasfield v. United States*, 272 U.S. 448 (1926). In that case, the Supreme Court held it is improper for a trial court to inquire into the numerical division of a jury. They also point to the opinion in *United States v. Spitz*, *supra*, in which the Eleventh Circuit extended the *Brasfield* rule to jury polls. We believe the trial judge has a limited discretion to determine whether the circumstances demonstrate a lack of coercion upon the initially dissenting member of the jury. We will therefore review the district court's order denying a mistrial for an abuse of that discretion. Since a lack of coercion is demonstrated by this record, we find no abuse of discretion.

In *Brasfield*, after "some" hours of deliberation, the trial judge inquired as to how the jury stood numerically. Without revealing which jurors favored conviction, the foreman disclosed that the jury stood nine to three. In reversing, Justice Stone stated:

> We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned.

272 U.S. at 450. This Court has relied upon the *Brasfield* prohibition to condemn a trial judge's sending a note to the jury foreman to determine the jury's division. *Government of the Virgin Islands v. Romain*, 600 F.2d 435 (3d Cir. 1979).[4]

Neither *Brasfield* nor *Romain* was decided in the context of a jury poll. In addition, *Brasfield* was decided before the adoption of the Federal Rules of Criminal Procedure which expressly permit polling of

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4. Since *Brasfield* makes no mention of the due process clause or any other constitutional protection, other Courts of Appeals have rejected the contention that the *Brasfield* bar must be adhered to when reviewing state criminal proceedings on *habeas corpus*. *E.g.*, *Williams v. Parke*, 741 F.2d 847 (6th Cir. 1984), *cert. denied*, 470 U.S. 1029 (1985); *Locks v. Sumner*, 703 F.2d 403 (9th Cir.), *cert. denied*, 464 U.S. 933 (1983); *Cornell v. Iowa*, 628 F.2d 1044 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *Ellis v. Reed*, 596 F.2d 1195 (4th Cir.), *cert. denied*, 444 U.S. 973 (1979). *See also Lowenfield v. Phelps*, ___ U.S. ___, 108 S.Ct. 546, 552 n.3 (1988).

the jury in a criminal case. Fed.R.Crim.P. 31(d). However, the Eleventh Circuit, in *Spitz*, held that the rule in *Brasfield* does extend to the polling of a jury pursuant to Fed.R.Crim.P. 31(d). *Spitz* involved a single defendant. Following the announcement of a guilty verdict, a juror voiced her disagreement. The trial court continued the polling. The appellate court, citing *Brasfield*, held that "the effect of what the court did in this instance, by continuing the poll for no reason at all, was to establish how the jury stood numerically. To do so was per se error." 696 F.2d at 917. To this ruling, the court carved an "exceptional circumstance" limitation to the reversal requirement. "An exceptional circumstance may arise when there is an apparent confusion on the juror's part that may be clarified by interrogation by the court . . . ." *Id.* at 918 n.1.[5]

At least two Courts of Appeals have chosen not to require *per se* reversal once a jury poll reveals an

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5. We note that this Court, in *United States v. Aimone*, 715 F.2d 822, 833 (3d Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984), cited *Spitz* for the proposition that to continue polling after a juror has dissented is erroneous. Since that particular issue was not under scrutiny in Aimone, the reference to the *Spitz* rule is a *dictum* which we choose not to follow. Additionally, we are aware of a passage within the Supreme Court's recent decision in *Lowenfield v. Phelps*, *supra*, wherein Chief Justice Rehnquist stated: "Although the decision in *Brasfield* was an exercise of this Court's supervisory powers, it is nonetheless instructive as to the potential dangers of jury polling." 108 S.Ct. at 552 (footnote omitted). We do not believe that this sentence must be interpreted to reflect the Supreme Court's extension of *Brasfield* to the jury polling context. The Supreme Court has never expressly considered the issue. *Lowenfield* dealt only with a state trial judge's inquiry of a jury as to whether continued deliberations would be helpful in obtaining a verdict. The poll sought to determine whether the members of the jury thought that a hung jury was inevitable. It was not designed to ascertain the numerical division of the jurors on the question of the penalty to be imposed in a capital case.

internal division of the jurors. In *Amos v. United States*, 496 F.2d 1269 (8th Cir.), *cert. denied*, 419 U.S. 896 (1974), the Eighth Circuit distinguished *Brasfield* and held that Fed.R.Crim.P. 31(d)[6] grants a trial court conducting a jury poll a certain measure of discretion in clearing up confusion once a verdict is returned. The opinion stresses that "since the trial judge is present on the scene, we must pay due deference to his views on whether the recalcitrant juror's ultimate acquiescence in the verdict came freely, without pressure from the court." *Amos*, 496 F.2d at 1273. Similarly, in *United States v. Brooks*, 420 F.2d 1350 (D.C. Cir. 1969), a jury poll revealed two jurors who did not fully agree to the guilty verdicts announced by the forewoman in a multiple-count criminal prosecution. Defense counsel requested that the remaining jurors be polled. Questioning of the two recalcitrant jurors led to one juror's agreeing to the guilty verdict on the controverted count. The court ordered the jury to deliberate further. Following twenty minutes of additional deliberations, the jury found the defendant guilty on that count upon which, because of the jury's division, the court had not accepted a verdict. The District of Columbia Circuit also noted that Fed.R.Crim.P. 31(d) invests the trial court with discretion and that such discretion must be accorded proper deference by a reviewing court. *Brooks*, 420 F.2d at 1353. The court also cited the fact that defense counsel requested the poll and failed to object to questioning of the jurors as significant factors in

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6. Fed.R.Crim.P. 31(d) reads as follows:

> (d) Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

upholding the judgment of sentence. *Id.* at 1354. Finally, the court emphasizes that, unlike the trial judge's inquiry in *Brasfield*, jury polling is both a necessary and useful device for preserving a defendant's right to a unanimous verdict. *Id.* at 1354.

Brasfield was decided on supervisory rather than constitutional grounds in 1926, a time before any independent federal rules governing criminal procedure had been adopted. *Cf. United States v. Noah*, 594 F.2d 1303, 1305 (9th Cir. 1979) (per curiam) (Kilkenny, J., dissenting) (questions continuing vitality of *Brasfield* rule after enactment of Federal Rules of Criminal Procedure incorporating the harmless error rule). The decisions in the *Amos* and *Brooks* cases seem to us to be consistent with the rules adopted since *Brasfield* and to represent the better approach to an inadvertent disclosure of a jury's division through polling. Accordingly, we reject the *Spitz* view that the Supreme Court's *Brasfield* holding requires *per se* reversal in the context of a jury poll in favor of a rule vesting discretion in the trial court. It cannot be gainsaid that a trial judge is in the best position to weigh the circumstances peculiar to each trial and determine whether a poll coerced a juror into acquiescing in the majority's demands. This approach is not inconsistent with our holding in *United States v. Aimone*, 715 F.2d 822 (3d Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984). In *Aimone*, a juror initially expressed disagreement during a poll. The trial judge ordered that deliberations continue without further polling. A unanimous guilty verdict was then recorded. We held that the court properly ordered further deliberations despite a motion for a mistrial. We emphasized that an appellate court must defer to the judgment of the trial judge in such situations, particularly in lengthy trials. *Id.* at 832.

Appendix C

Here, the trial court carefully considered and rejected appellants' request for a new trial. In so ruling, the court referred to a number of factors surrounding the continuation of the jury poll after Mr. Fonseca's dissent. They include counsels' failure to voice a specific and contemporaneous objection to the polling, which demonstrates to some degree the absence of a coercive atmosphere. Upon learning of the dissidence, the trial judge dismissed the jurors for the day. This removed Mr. Fonseca from the immediate "attacks" of his peers. Before deliberations resumed the next day, the trial judge delivered a cautionary instruction asking the jurors to carefully weigh and consider the views of their fellow jurors. Most important was the trial court's reliance on the deliberations having continued for an additional two days before the jury returned unanimous guilty verdicts against the appellants. The district court concluded that this lapse of time before the return of guilty verdicts demonstrated that the lone dissenting juror was not coerced by the poll to capitulate to the views of the majority. *Cf. Brooks*, 420 F.2d at 1353-54 (jury's returning verdict after twenty minutes of deliberations after poll upheld). Although Mr. Fonseca initially stood as the lone vote for acquittal on Thomas Fiorilla's and Frances Scullion's verdicts, the jury ultimately acquitted them. His view on these two defendants in the end carried the day. Thus, it was plain to the district judge, as it is to us, that Mr. Fonseca was not afraid to stand up for his convictions and that his peers took his opinions seriously during their two days of further deliberations.

We also accept as appropriate the district court's assertion that it was attempting to take partial verdicts wherever possible in a relatively complex multi-count, multi-defendant criminal prosecution. Appellate courts should be willing to allow trial judges discretion

to deal with the exigencies that are bound to arise in today's modern multi-party litigation. While it may generally be preferable to immediately conclude a poll and return the jury for further deliberations once a dissent is noted, we find no abuse of discretion in the course taken here.

Accordingly, the judgments of the district court will be affirmed in all respects.

Appendix C

Listing of Contentions Raised and Rejected but not Discussed in Opinion

A. Contentions of Both John and Mary Fiorilla:

1. The district court erred in allowing the testimony of Immigration and Naturalization Service Agent John Lonergan.

2. The district court erred in admitting the arrest book into evidence.

3. The district court erred in refusing to disclose the identity of Immigration and Naturalization Service Agent Michael Bassanta.

4. The district court erred in failing to unseal the transcript of the *ex parte* discussion with the prosecutor.

B. Contention of John Fiorilla:

5. The district court erred in failing to grant John Fiorilla's motions for judgments of acquittal.

C. Contentions of Mary Fiorilla:

6. The district court erred in allowing into evidence inflammatory and prejudicial evidence.

7. The evidence was insufficient to support Mary Fiorilla's convictions.

8. The district court's jury instructions were erroneous.

Appendix C

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX D — JUDGMENT AND PROBATION/ COMMITMENT ORDER IN APPELLANT'S CAUSE, ENTERED BY THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY, FILED JULY 8, 1987

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Defendant: United States of America vs.
JOHN FIORILLA

Docket No. Cr. 86-291

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: June 26, 1987.

Counsel:

_____ WITHOUT COUNSEL however the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

__X__ WITH COUNSEL Adolph J. Galluccio, Esq.

Plea:

_____ GUILTY, and the court being satisfied that there is a factual basis for the plea,

_____ NOLO CONTENDERE,

__X__ NOT GUILTY: July 8, 1987, at 8:30, by William T. Walsh, Clerk

Appendix D

Finding & Judgment:	There being the verdict of: _____ NOT GUILTY, Defendant is discharged __X__ GUILTY. Defendant has been convicted as charged of the offense(s) of conspiracy: Conceal, harbor and shield aliens. Count 1. Conceal, harbor and shield illegal aliens. Count five thru 13. Make false statements and representations to the Dept. of Labor and INS. Counts 14 and 15.
Sentence or Probation Order:	The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that. The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three years on Count 1 and a fine of $10,000.00. Execution of term sentence is suspended and defendant is placed on probation for three years from this date. Imposition of sentence is suspended on Counts 5, 6, 7, 8, 9, 10, 11, 12 and 13 and defendant is placed on probation for three years. Probation to run concurrently with each other and with Count 1.

Appendix D

Defendant shall pay a fine of $2,000.00 on each of Counts 5 thru 13.

Imposition of sentence is suspended on each of Counts 14 and 15 and defendant is placed on probation for three years on each Count to run concurrently with each other and concurrently with each of Counts five thru 13 and concurrently with Count 1.

Special Conditions of Probation:

Defendant shall pay a fine of $10,000.00 on each of Counts 14 and 15.

Total fines on all Counts $48,000.00.

All fines to be paid within the first two years of probation.

Defendant is directed to have no contact or engage in any way as an owner, officer, consultant, investor or otherwise in the nursing home business.

Additional Conditions of Probation:

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Appendix D

Commitment Recommendation:

The court orders commitment to the custody of the Attorney General and recommends:

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed by:

___ U.S. District Judge

___ U.S. Magistrate

s/ J. Bissell

Date: July 8, 1987

Nos. 88-401 and 88-467

Supreme Court, U.S.
FILED
OCT 31 1988
JOSEPH E. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

MARY FIORILLA, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN FIORILLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

JOHN F. DE PUE
Attorney

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QUESTION PRESENTED

Whether the district court properly continued to poll the jury, revealing its numerical division, after a member of the jury expressed disagreement with the announced verdict.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-401

MARY FIORILLA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 88-467

JOHN FIORILLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (88-401 Pet. App. 1a-15a) is reported at 850 F.2d 172.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1988. Petitions for rehearing were denied on July 26, 1988 (88-401 Pet. App. 16a-17a; 88-467 Pet. App. 2a-3a). The petition for a writ of certiorari in No. 88-401 was filed on August 31, 1988. The petition for a writ of certiorari in No. 88-467 was filed on September 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioners, a husband and wife, were convicted of conspiring to harbor illegal aliens, in violation of 18 U.S.C. 371; nine substantive counts of harboring illegal aliens, in violation of 8 U.S.C. 1324; and two counts of making false statements to officials of the Immigration and Naturalization Service, in violation of 18 U.S.C. 1001. Petitioners were sentenced on the conspiracy count to a three-year term of imprisonment, the execution of which was suspended in favor of three years' probation. Imposition of sentence on the other counts was suspended, and petitioners were ordered to pay $48,000 in fines.[1]

1. Following petitioners' trial, the jury deliberated for approximately 6½ hours and informed the court that it had reached a verdict (Pet. App. 3a).[2] The jury returned to the courtroom, and the jury foreman

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[1] Three co-defendants, Thomas Fiorilla, Frances Scullion, and Charles Hirschkind, were also charged with conspiracy and harboring illegal aliens. The three were acquitted on all counts.

[2] "Pet. App." refers to the appendix to the petition in No. 88-401.

announced verdicts of guilty against the two petitioners on all counts. The foreman also reported that the jury had found co-defendants Thomas Fiorilla and Frances Scullion guilty on some counts and not guilty on others, and reported that one co-defendant, Charles Hirschkind, had been acquitted on all counts (*id.* at 4a). After the verdict was read, counsel for petitioner John Fiorilla requested that the individual jurors be polled (*ibid.*). The first nine jurors concurred with the announced verdict. When the trial judge reached the tenth juror, the following colloquy occurred (*id.* at 4a-5a):

> The Court: Mr. Fonseca, do you agree or disagree with the verdict against John Fiorilla as I have just reported it?
>
> Juror No. 10: I disagree.
>
> The Court: You disagree with the verdict as reported?
>
> Juror No. 10: Yes.
>
> The Court: Did I report it inaccurately?
>
> Juror No. 10: Yes.
>
> The Court: Let me reiterate what was stated here. As I told you, your verdict in this case had to be 12 nothing. Correct?
>
> . . . .
>
> In other words, the report of the jury here on this verdict sheet was that the jury had found Mr. John Fiorilla unanimously guilty on all counts with which he was charged. Now, what I'm asking you is do you agree or disagree with this verdict as reported here?
>
> Do you understand what I am saying?
>
> Juror No. 10: Yes, I understand. Yes, to be honest, I have no peace in me.

The trial judge then excused the other 11 jurors and returned to his discussion with juror Fonseca (Pet. App. 5a).

> The Court: Mr. Fonseca, I'd like to hear what you have to say or what you meant by that comment and we will take it from there. When you said you have no peace in you, could you amplify that for us please?
>
> Juror No. 10: Sure. When we were up there in the jury room discussing [sic] the defendants were guilty or not guilty, I gave my opinion and everyone gave their opinion and when I gave mine all of them started giving me their point of view and I kind of saw myself, you know, attacked, you know, and so I agreed. But—

The trial judge then reviewed with juror Fonseca the portion of the charge referring to the obligation of the jurors to deliberate with a view to reaching a consensus after consultation with one another but without doing violence to the individual conscience of each (*ibid.*). Fonseca explained that the final vote did not reflect his conscientious conclusion concerning petitioner John Fiorilla's guilt or innocence (*id.* at 5a-6a).

All counsel then agreed that Fonseca should be questioned concerning his views with respect to the other defendants. Although he agreed with the verdicts exonerating Hirschkind, Fonseca disagreed with the verdicts of guilt against petitioner Mary Fiorilla, and he disagreed with the verdicts of guilt against co-defendants Thomas Fiorilla and Scullion. He agreed with the jury's verdicts of not guilty against the latter two defendants on some of the counts. Pet. App. at 6a.

The trial judge then expressed his intention to poll the remaining jurors (Pet. App. 6a & n.3). Petitioners' counsel did not object to the proposed procedure (*ibid.*). The poll showed that the other jurors agreed with the guilty verdicts against petitioners

and their co-defendants, thus revealing an 11 to 1 split. The court then temporarily excused the jury but directed the jurors to return for further deliberations the following morning (*id.* at 6a-7a).

The next morning, the trial judge informed counsel that in *United States* v. *Spitz*, 696 F.2d 916 (1983) (per curiam), the Eleventh Circuit had ruled that a trial judge cannot continue a poll once a dissenter has been identified (Pet. App. 7a). Although the judge was not prepared to grant a mistrial on that ground, he explained that he wished to advise counsel of the results of his research (*ibid.*). The court then directed the jury to continue its deliberations. After two days of additional deliberations, the jury returned verdicts once again convicting petitioners on all counts. Petitioners' co-defendants Thomas Fiorilla and Frances Scullion were acquitted on all counts. A poll of the jury showed that there was no discrepancy between the jury's verdicts and the jurors' individual votes. *Ibid.*

The trial court denied petitioners' post-trial motion for a new trial, in which petitioners argued that a new trial should have been granted because the court had erred in continuing the poll of the jury after Fonseca expressed disagreement with the verdict (Pet. App. 7a).

2. The court of appeals affirmed (Pet. App. 1a-13a). The court rejected petitioners' argument that under *Brasfield* v. *United States*, 272 U.S. 448 (1926), it was improper for the court to complete the poll of the jury after one of its members expressed disagreement with the reported verdict (Pet. App. 7a). The court distinguished *Brasfield* by noting that that case had involved a trial court's inquiry to a jury that had reported a deadlock, rather than a jury poll after an announced verdict as in this case (*id.* at 9a).

The court added that the decision in *Brasfield* had preceded the adoption of the Federal Rules of Criminal Procedure, which expressly provide in Rule 31(d) for polling the jury after its verdict and returning it for deliberations in the absence of unanimity (Pet. App. 9a). The court also noted that the harmless error rule had been incorporated in the rules governing criminal procedure since *Brasfield* was decided (*id.* at 11a-12a). The court disagreed with the Eleventh Circuit's conclusion, expressed in *United States* v. *Spitz*, *supra*, that under *Brasfield* it is per se reversible error for a court to complete a jury poll after one juror has dissented from the verdict (Pet. App. 12a). The court found that vesting discretion in the trial court in that situation is "consistent with the rules adopted since *Brasfield* and * * * represent[s] the better approach to an inadvertent disclosure of a jury's division through polling" (*ibid.*).

The court then examined the factors that led the district court to continue the poll after one juror's dissent and found no abuse of discretion (Pet. App. 12a-13a). The court remarked that counsel for petitioners had not objected to the poll, which demonstrated "to some degree the absence of a coercive atmosphere" (*id.* at 12a). The court also noted that the division in the jury had prompted the judge to dismiss the jurors for the rest of the day, thus removing the dissenter "from the immediate 'attacks' of his peers" (*id.* at 12a-13a). The following morning, the court observed, the judge gave a cautionary instruction that each juror should weigh carefully the views of his or her peers (*id.* at 13a). Two days of further deliberations ensued before the jury returned unanimous verdicts of guilty against petitioners

(*ibid.*). The court pointed out that, as the district court had noted, "this lapse of time * * * demonstrated that the lone dissenting juror was not coerced by the poll to capitulate to the views of the majority" (*ibid.*). The court added that after its further deliberations the jury had acquitted petitioners' two co-defendants. Since juror Fonseca had been the only vote for acquittal of those defendants at the time the verdicts were first announced, the court observed that "[h]is views on these two defendants in the end carried the day." (*Ibid.*). These factors made it "plain * * * that Mr. Fonseca was not afraid to stand up for his convictions and that his peers took his opinions seriously during their two days of further deliberations" (*ibid.*).[3]

ARGUMENT

1. Petitioners contend (88-401 Pet. 8-9; 88-467 Pet. 8-10) that the district court's continuation of the jury poll following one juror's dissent is contrary to the decision of this Court in *Brasfield* v. *United States*, 272 U.S. 448 (1926), and constitutes per se reversible error.

In *Brasfield* v. *United States*, *supra*, the trial judge, after deliberations had stalled, inquired how the jury was divided and was informed that it stood nine to three. The jury resumed deliberations and subsequently found the defendants guilty (272 U.S. at 449). This Court held that the inquiry into the jury's

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[3] The court also indicated that appellate courts should accord discretion to trial judges to respond to exigencies arising in complex, multi-defendant cases, and accepted the district court's explanation that its continued poll was an attempt to take a partial verdict "in a relatively complex multi-count, multi-defendant criminal prosecution" (Pet. App. 13a).

division after it had announced its failure to agree required reversal because "in general its tendency is coercive" and it almost always brought to bear "in some degree, serious although not measurable, an improper influence upon the jury" (*id.* at 450).[4]

The court of appeals properly refused to extend the holding of *Brasfield* from the deadlocked jury setting to the polling of a jury that has announced a verdict. Identifying the number of holdouts on a deadlocked jury is wrong, the Court explained in *Brasfield*, because it may bring an "improper influence" to bear on the jurors and because the practice is "never useful" (272 U.S. at 450).[5] A jury poll, by contrast, has as its purpose to verify publicly that the jury's report of a unanimous verdict reflects the vote of each juror without coercion. *Humphries* v. *District of Columbia*, 174 U.S. 190, 194 (1899); *United States* v. *Lopez*, 581 F.2d 1338, 1341 n.2 (9th Cir. 1978); *Miranda* v. *United States*, 255 F.2d 9, 17 (1st Cir. 1958). The right to a jury poll is guar-

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[4] The Court noted that in *Burton* v. *United States*, 196 U.S. 283, 307 (1905), it had "condemned the practice of inquiring of a jury unable to agree, the extent of its numerical division" (*Brasfield*, 272 U.S. at 449). The Court had explained in *Burton* that "[c]ases may easily be imagined where a practice of this kind might lead to improper influences" (196 U.S. at 308). In *Brasfield*, the Court resolved a conflict among courts of appeals as to whether the inquiry criticized in *Burton* was reversible error (*Brasfield*, 272 U.S. at 449-450).

[5] Courts have noted that inquiries about the division of the jury after a reported deadlock may exert an undue influence on minority jurors, who could interpret the judge's supplemental instruction for jurors to reconsider their views as being directed specifically to them. *United States* v. *Rogers*, 289 F.2d 433, 435 (4th Cir. 1961); *United States* v. *Sae-Chua*, 725 F.2d 530, 532 (9th Cir. 1984).

anteed by Fed. R. Crim. P. 31(d). If a dissent emerges during the poll, it is inevitable that a split among jurors—and the identity of at least one of the dissenters—is revealed. In that situation, Fed. R. Crim. P. 31(d) authorizes the trial judge to declare a mistrial and discharge the jury, or to require the jury to resume its deliberations in an effort to reach a conclusive verdict.

By authorizing the resumption of deliberations after a poll has revealed a disagreement—even though the poll may reveal the identity of the dissenter and the fact that the jury is heavily disposed in favor of conviction—Rule 31(d) indicates that it is inappropriate to extend the per se rule of error adopted in *Brasfield* to the jury poll setting.[6] Thus, even if it is the twelfth juror polled who turns out to be the dissenter, the court is not required to declare a mistrial, even though in that situation, as in *Brasfield*, the division of the jury will have become public, and the potentially coercive effect of that revelation will be at least as great as in the case of a jury that has announced that it is deadlocked.

Because Rule 31(d) accords district courts "discretion in assessing the impact of a dissenting vote during a jury poll" (*United States* v. *Brooks*, 420

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[6] As the court of appeals noted (Pet. App. 10a n.5), this Court in *Lowenfield* v. *Phelps*, No. 86-6867 (Jan. 13, 1988), did not extend *Brasfield* to jury polls conducted under Fed. R. Crim. P. 31(d) or other analogous authority. The Court noted the "potential dangers of jury polling" (slip op. 8), but it did not suggest that those dangers should prohibit a poll where the rules require it, nor did it suggest that the per se rule of *Brasfield* should be extended beyond the context of deadlocked juries. *Lowenfield*, like *Brasfield* itself, involved inquiries to a jury that had reported an inability to reach a decision.

F.2d 1350, 1353 (D.C. Cir. 1969)), it should be permissible for a court to complete the poll of the jurors or to repoll the jury altogether after some disagreement has surfaced, if that procedure would help clarify the confusion regarding the verdict or inform the court's discretion as to whether to discharge the jury or require the jury to resume its deliberations. See *United States* v. *Morris*, 612 F.2d 483, 489 (10th Cir. 1979) (repolling the jurors permissible where confusion arises in multi-defendant, multi-count case); *Amos* v. *United States*, 496 F.2d 1269 (8th Cir.) (completion of poll on count on which dissenter agreed with verdict), cert. denied, 419 U.S. 896 (1974); *United States* v. *Brooks*, *supra* (completion of poll at defense counsel's request following indication of doubts by one juror); *Williams* v. *United States*, 419 F.2d 740 (D.C. Cir. 1969) (en banc) (completion of poll following confused response by one juror); *Cook* v. *United States*, 379 F.2d 966 (5th Cir. 1967) (repolling proper where one or more jurors indicates he voted for conviction based on a recommendation of leniency).

To be sure, the district court is not required to complete the poll once one of the jurors makes an unequivocal expression of dissent, and in most cases the better practice is for the court to terminate the poll at that point. See *United States* v. *Aimone*, 715 F.2d 822 (3d Cir. 1983), cert. denied, 468 U.S. 1217 (1984); *United States* v. *Freedson*, 608 F.2d 739 (9th Cir. 1979). But there are cases, such as this one, in which continuing the poll does not add significantly to the risk of coercing the dissenting juror, and in which continuing the poll can have benefits, such as permitting the court to take a partial verdict if there is unanimity on the jury with respect to some

defendants or some counts. In such a case, we submit that the better rule is to give the district court discretion to continue the poll if, in the court's judgment, the benefits of continuing the poll outweigh the risks of coercing the dissenting juror or jurors to acquiesce in the verdict.

Even if the district court's action in continuing the poll is found to be error, it should be subject to the harmless error rule. Although the Court in *Brasfield* refused to apply harmless error principles to inquiries regarding the division of a deadlocked jury, developments in the law since the time of that decision counsel against extending it to a different context, such as the jury poll context at issue in this case. Twenty years after the decision in *Brasfield*, the Court promulgated Rule 52(a) of the Federal Rules of Criminal Procedure, which has been construed to require harmless error analysis of almost any statutory or constitutional violation that is asserted as the basis for reversal of a conviction. See *Pope* v. *Illinois*, No. 85-1973 (May 4, 1987), slip op. 5-6 & n.7; *Rose* v. *Clark*, 478 U.S. 570, 576-579 (1986). In particular, where there is no statutory or constitutional prohibition, this Court has held that "a federal court may not invoke supervisory power to circumvent the harmless error inquiry prescribed by Federal Rule of Criminal Procedure 52(a)." *Bank of Nova Scotia* v. *United States*, No. 87-578 (June 22, 1988), slip op. 4; see also *United States* v. *Hasting*, 461 U.S. 499, 506 (1983). Because extending the rule of *Brasfield* to the context of jury polls would be justified, if at all, only under the courts' supervisory powers, this Court's recent decisions in *Bank of Nova Scotia* and *Hasting* indicate that the court of

appeals was correct in applying harmless error principles to the district court's action in this case.

2. Petitioners also contend (88-401 Pet. 8-13; 88-467 Pet. 11-15) that the decision of the court of appeals in this case is contrary to the decision of the Eleventh Circuit in *United States* v. *Spitz*, 696 F.2d 916 (1983). In *Spitz*, the eighth juror in the poll stated that she did not concur in the announced verdict of guilty (*id.* at 917). After the remaining four jurors assented to the verdict, the judge instructed the eighth juror to stand, verified that she did not concur in the verdict, and gave the jury a supplemental "*Allen*" charge (*ibid.*). The jury returned with a unanimous verdict of guilty half an hour later (*ibid.*). The Eleventh Circuit reversed. The court stated that absent exceptional circumstances, it is "per se error" requiring reversal for a trial judge to continue a jury poll following the expression of dissent by one juror (*id.* at 917-918).

We agree that the per se rule adopted in *Spitz* conflicts with the holding in the present case that a trial court's continuation of a poll after a juror dissents should be reviewed for abuse of discretion. For the reasons set forth above, we believe that such a per se rule is incorrect, as it misconstrues *Brasfield*, the Federal Rules of Criminal Procedure, and the precedents on which the court relied.[7] Nevertheless, the de-

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[7] No case cited by the court in *Spitz* reversed a conviction because a trial judge had continued a poll after a juror dissented. In *Sincox* v. *United States*, 571 F.2d 876 (5th Cir. 1978), the court of appeals reversed because the trial court had entered a conviction despite a juror's dissent (571 F.2d at 876). The court never discussed the propriety of completing a poll. *United States* v. *Edwards*, 469 F.2d 1362 (5th

cision in this case is distinguishable from *Spitz* on its facts and the issue presented in the two cases is a very narrow one of only limited practical importance. Accordingly, we submit that the conflict in the analysis of the two decisions does not warrant this Court's review.

On its facts, the *Spitz* case presented a greater risk of coercion than this case, and the continuation of the poll was harder to justify. First, in *Spitz* the court followed the completion of the poll with an *Allen* charge, which could have been interpreted by the sole dissenting juror as specifically directed to that juror to reconsider her views. In this case, by contrast, the district court gave no *Allen* charge, but merely gave an extremely mild "duty to deliberate" charge (see C.A. App. JA 1809). Second, the jury in *Spitz* returned with a verdict of guilty after only a half hour of further deliberations, which suggests that the court's procedure may well have had a coercive effect on the dissenting juror. In this case, by contrast, the jury deliberated for an additional two days, a clear indication that the court's procedure did not break the dissenting juror's resistance. Third, when the jury in this case returned its verdict, it changed the previously announced verdict in several respects, acquitting two persons who had been found guilty in the jury's initial verdict. Fourth, this case, unlike *Spitz*, was a multi-defendant case. The district court continued the poll in part because it hoped that it could take a partial verdict as to some defendants on some counts, and in fact it did so. That justification was not present in *Spitz*.

Cir. 1972), like *Sincox*, involved the entry of a verdict over a dissent, not a poll completed after a dissent, followed by further deliberations.

In sum, although we believe that the *Spitz* court was wrong to adopt a per se rule of reversal for all cases in which a court continues a jury poll after one juror dissents from the verdict, the results in this case and *Spitz* are reconcilable on their facts. In light of the special dangers of coercion and the absence of any justification for continuing the poll in *Spitz*, the district court's action in that case could be viewed as reversible error in any circuit. Because the district court's action in this case was justified by a legitimate interest in obtaining a partial verdict, and because the facts disclosed no evidence of coercion, the continuation of the poll in this case can be regarded as within the district court's discretion or, at most, harmless error.

Even if the decisions in this case and in *Spitz* were truly in conflict, we submit that the conflict would not be of sufficient importance to warrant this Court's review. To our knowledge, no other court of appeals has faced the precise question presented here and in *Spitz* since the adoption of Rule 31(d) in 1946.[8] Although the District of Columbia and Eighth Circuits have dealt with related issues—and declined to reverse convictions where jury polls were continued after an expression of dissent—those cases involved special circumstances that distinguish them from this

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[8] Petitioners assert (88-404 Pet. 11; 88-467 Pet. 13) that the holding of the court below conflicts with its earlier decision in *United States* v. *Aimone*, 715 F.2d 822 (3d Cir. 1983), cert. denied, 486 U.S. 1217 (1984). Even if there were a conflict within the circuit, that would provide no basis for granting certiorari. But in any case, as the court below observed (Pet. App. 10a n.5), the question presented in this case was not at issue in *Aimone*, and the passing reference to the *Spitz* rule was merely dictum, which the court of appeals chose not to follow.

case and *Spitz*. In the Eighth Circuit case the court continued the poll only on a count as to which there was no expression of dissent, see *Amos* v. *United States*, *supra*, and in the District of Columbia Circuit cases, the poll was continued where defense counsel specifically requested it (see *United States* v. *Brooks*, *supra*), or where the juror in question gave a confused response that did not make clear whether that juror meant to dissent from the verdict (see *Williams* v. *United States*, *supra*). None of the other cases cited by petitioners (88-401 Pet. 9; 88-467 Pet. 14) are even arguably in conflict with the decision in this case or in *Spitz*.[9]

There are several reasons why the issue presented in this case arises so infrequently. First, dissents during jury polls are quite rare. Obviously, once a

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[9] Most of the cases cited by petitioners involve inquiries into the division of a jury that has reported an inability to agree—the same situation faced in *Brasfield* v. *United States*, *supra*. See *Cook* v. *United States*, 254 F.2d 871 (5th Cir. 1958); *Jacobs* v. *United States*, 279 F.2d 826 (8th Cir. 1960); *United States* v. *Rogers*, 289 F.2d 433 (4th Cir. 1961). The decision in *United States* v. *Sae-Chua*, 725 F.2d 530 (9th Cir. 1984), involved a variation on that theme. In that case, after the jury foreman had advised the trial judge that there was only one juror who persisted in voting not guilty, the trial judge gave a supplemental charge, which the court of appeals found to be coercive. Two cases cited by petitioners involve state convictions, to which *Brasfield's* supervisory rule is inapplicable. *Cornell* v. *Iowa*, 628 F.2d 1044 (8th Cir. 1980), cert. denied, 449 U.S. 1126 (1981); *United States ex rel. Anthony* v. *Sielaff*, 552 F.2d 588 (7th Cir. 1977) (upholding conviction after state judge polled deadlocked jury and instructed the jurors to resume deliberations). Finally, *United States* v. *Essex*, 734 F.2d 832 (D.C. Cir. 1984), had nothing to do with polling or inquiring about numerical division, as it involved a conviction by an 11-person jury when the 12th juror failed to show up.

jury has announced agreement, it is unusual for some juror to change his mind during the poll. Second, the usual practice when a dissent emerges during the poll is for the court to terminate the poll and require the jurors to resume their deliberations. Only in rare instances do district courts continue the poll after one juror dissents. Third, the issue does not arise in cases in which the reviewing court, applying the Third Circuit's rule, finds the continuation of the poll to have been coercive, as the Third Circuit might well have found on the facts of *Spitz*.

The competing rules adopted by the Third and Eleventh Circuits will produce a different result only in those rare instances in which a court continues a poll after an unequivocal expression of dissent, on a count as to which the dissenting juror disagreed with the verdict, and where defense counsel has not requested the continuation of the poll. In those rare cases, any resulting conviction is per se invalid in the Eleventh Circuit, while in the Third Circuit it may be affirmed if the reviewing court concludes that the practice did not result in coercion on the facts of the particular case. As a consequence of those competing rules, district courts in the Eleventh Circuit may be more reluctant to continue jury polls than district courts in the Third Circuit. But unless the issue begins to rise with more frequency than it has to date, it does not affect enough cases to justify this Court's intervention.

Finally, the decision in this case works no unfairness to petitioners because, even if the inquiry that resulted in revelation of the jury's alignment was improper, the error was plainly harmless. As the court of appeals observed (Pet. App. 12a-13a), immediately following the disclosure of the one juror's dissent the

jury was excused for the day, which gave the jury and the dissenting juror a "cooling-off" period. After reconvening, the jury deliberated for an additional two days before returning guilty verdicts against petitioners. The fact that the dissenting juror felt no coercive effect as a result of earlier disclosure of his lone dissent is confirmed by his success in convincing his peers to acquit two of petitioners' co-defendants on all charges—as he had favored in open court. *Ibid.* Finally, petitioners' counsel did not object to the continued poll at the time the court proposed it. While the court of appeals did not decide this case on waiver grounds (*id.* at 6a), this Court has noted that the "omission [of an objection of counsel] indicates that the potential for coercion argued now was not apparent to one on the spot" (*Lowenfield* v. *Phelps*, No. 86-6867 (Jan. 13, 1988), slip op. 9 (footnote omitted)). On this record, any alleged error by the trial court in continuing the poll could not have resulted in denial of a fair trial to petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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